No. 84-35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PENYU BAYCHEV KOSTADINOV,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Introduction

At the very beginning of its brief the Government makes the following statement:

> 2. The district court granted petitioner's motion to dismiss the indictment, concluding that because, in its view, the New York trade office in which petitioner worked was part of the premises of the Bulgarian embassy, his title "assistant commercial counselor" makes him a member of the staff of the "embassy" and entitles him to diplomatic imunity.

Gov't. Br. at 3.

That statement is inaccurate and misleading. The District Court made no such finding. It did not find petitioner was entitled to immunity because he worked in the "premises" of the mission. It found that he was entitled to immunity under the Vienna Convention on Diplomatic Re-

lations as a member of the administrative and technical staff of the mission, notified to and accepted as such by the United States. Pet. App. at 44a-49a.

The Government compounds the confusion by stating that:

> the court of appeals concluded that petitioner in fact is not a member of the Bulgarian "mission" for purposes of the immunity conferred by the Vienna Convention.

Gov't. Br. at 4.

Under the Vienna Convention, it is not possible to be a member of a mission and at the same time be denied the immunities provided for members of the mission.

The Court of Appeals has misread the District Court's findings and, as a consequence, has misinterpreted the applicable provisions of the Vienna Convention. The Government's arguments are premised upon these errors of fact and law.

ARGUMENT

1. The Government argues that the petitioner relies upon a portion of a press release issued by the United States to support his contention that the United States and Bulgaria entered into a binding international compact which authorized the Bulgarian mission to establish the Office of Commercial Counselor in New York as an integral part of the mission. Nothing could be further from the truth.

In the first place, the portion of the press release quoted by the Government is torn out of context. The complete statement on this subject made by the United States is the diplomatic note delivered by the United States Legation in Sofia to the Ministry of Foreign Affairs of Bulgaria and the accompanying Statement on U.S.-Bulgarian Trade Relations which refers to:

> The conclusion of an agreement on financial claims and related issues between the United States of America and the People's Republic of Bulgaria.

Pet. App. C at 82a.

Equally misleading is the Government's description of the "Statement and Other Matters." Gov't. Br. at 7. The Statement on U.S.-Bulgarian Trade Relations refers to "an agreement of financial claims *and related issues*" (emphasis supplied).

The Government concedes that the United States authorized the Bulgarian Legation to open a commercial office as an integral part of the mission. It contends, however, that this authorization did not constitute a binding international obligation because it was not an integral part of the claims settlement agreement.

The petitioner does not argue that it is a part of the text of the claims settlement agreement but rather that the authorization to open the commercial office as part of the mission is incident to the claims agreement. They are interdependent. Neither agreement would have been entered into without the other. That is what the record shows and what the District Court found after extensive hearings including oral and documentary evidence. In the State Department documents, the authorization to open the commercial office as part of the mission is described as a constituting "an associated feature of the general settlement". Gov't. C.A. App. at 192. The statement authorizing the opening of the commercial office as part of the mission was described by the State Department as "one of the bargaining levels used in the negotiations". Gov't. C.A. App. at 200.

The letter of the United States Minister to Bulgaria (signatory of the agreement) transmitting the documents to the State Department included the authorization as part of the interdependent agreements, as follows:

after the Bi-lateral Agreement, deprive the petitioner of the immunities accorded him under the Vienna Convention.* Such unilateral actions cannot cancel the treaty obligations assumed by the United States. A treaty cannot be changed without the express consent of both parties. The State Department cannot contract or expand a treaty. *Samann* v. *Commissioner of Internal Revenue*, 313 F.2d 461 (4th Cir. 1963); *The Society for the Propagation of the Gospel in Foreign Parts* v. *New Haven*, 8 Wheaton 464 (1823). Nor can inadmissible evidence such as post-treaty conversations be used to alter a convention. These conversations have nothing to do with the state of mind of the treaty negotiators; they merely purport to express later views of the State Department. This Court has refused to accept such evidence in interpreting a treaty. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184 n.3 (1981).**

3. The Government argues that if the express consent of the United States that authorized the opening of the commercial office as part of the mission is disregarded, the Vienna Convention does not require that the petitioner be accorded immunity from criminal prosecution. We do not understand how the express consent can be disregarded since the Government concedes that the commercial office is part of the mission even while disagreeing that the authorization is part of an international compact. In making this argument the Government echoes the Court of Appeals in misinterpreting Article 11 of the Vienna Convention.

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* At one point, the Government asserts that these representations were made "contemporaneously with the issuance of the press release in 1963" Gov't. Br. at 10. That assertion is at variance with the record and contradicts the Government's own statement of the facts. Gov't. Br. at 5 and 9.

** The State Department's policy with respect to the location and immunities of the personnel of the commercial offices of other missions (see Gov't. Br. at 9 n.5), is not pertinent. As this Court has pointed out, each treaty must be interpreted in the light of its own negotiating history. *Sumitomo Shoji American, Inc.* v. *Avagliano, supra,* 457 U.S. at 185 n.12.

This argument fails for several reasons. In the first place, as the District Court found, the United States never limited the size of the Office of the Commercial Counselor. Secondly, Article 11 has nothing to do with the immunity status of the personnel to missions and thus it cannot be used as a source of authority for denying immunity to a person who, in compliance with Article 10, has been accepted as a member of the staff of the mission and has not been declared *persona non grata* or not acceptable under Article 9. Petitioner's view is also supported by the Report of the United States Delegation to the United Nations Conference on Diplomatic Intercourse and Immunities, Department of State Publication 7289, International Organization and Conference Series 24, released February 1962. That report, which in its Conclusions states that it reflects the position as formulated in the Department of State, makes clear in Section I. Diplomatic Intercourse in General that Articles 2 to 12 of the Vienna Convention

> relate to the establishment of diplomatic relations between States, the functions of the mission, its size, the location of its offices, the appointment by the sending State of members of the mission, and their acceptability to the receiving State.

They do not relate to the subject of personal privileges and immunities. That subject is dealt with in Articles 29 through 38, under a subsection of the report entitled Personal Privileges and Immunities of Diplomatic Agents.

The Government does not really challenge this conclusion. It argues that the representations of the State Department subsequent to the Bi-lateral Agreement defeat the claim that the petitioner was accepted (a contention which we have shown is contrary to law and is inconsistent with the terms of the Vienna Convention to which no reservation has been made, *supra*, pp. 5-6) and that the issuance of an A-2 visa to the petitioner did not "necessarily" confer diplomatic immunity.

On the subject of the A-2 visa, the flaw in the Government's argument is that it is an abstraction. Perhaps under certain circumstances the granting of the visa would not "necessarily" confer immunity. But there is nothing abstract about the facts of this case. The State Department, on four separate occasions, granted A-2 visas to the petitioner in acceptance of his applications in which he informed the Department that they served for the purpose of his employment as a member of the staff of the mission at the Office of Commercial Counselor in New York. As the District Court found, the notification and acceptance were in conformity with Article 10 of the Convention as well as with the procedures of the State Department. *United States* v. *Dizdar,* 581 F.2d 1031 (2d Cir. 1978).

The failure of the United States to publish the agreement authorizing the establishment of the commercial office as part of the mission in the Treaties in Force in compliance with its obligations under law cannot change the existence of the international compact nor can its failure to include the petitioner in the White List, deny him the immunities to which he is entitled under the Vienna Convention. *Cf. Trost* v. *Tompkins,* 44 A.2d 226 (Mun. Ct. App. D.C. 1945); *United States* v. *Dizdar, supra.**

4. Because of the importance of this case to the development of international law, it is vital that the Court grant review. This case involves issues of first impression with respect to the interpretation of the Vienna Convention. The decision of the Court of Appeals denying the character of the Bi-lateral Agreement as a binding international compact is in conflict with the decisions of this Court in

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* That non-inclusion in United Nations publications does not change the legal effect of an international compact between states is made clear by Article 3 of The Vienna Convention on the Law of Treaties, 63 Am. J. Int'l. Law 875, 876, the text of which is reprinted in the Appendix to this brief.

Pink, Belmont, Weinberger v. *Rossi* and *Dames & Moore* v. *Regan,* as well as the decision of the Fourth Circuit in *Arlington,* which elucidated the doctrine of this Court in a context similar in principle to this case.* Clarification by this Court is also essential in light of the fact that the State Department's views, as expressed to the courts below, have been contradictory. In the District Court, it contended the United States never authorized the establishment of the commercial office in New York as part of the Bulgarian mission. In the Court of Appeals, it withdrew from that position and conceded what it had denied in the District Court, but refused to recognize the authorization as an international compact. Further, the Government's interpretation of Article 11 of the Vienna Convention is in conflict with the clear language of the Vienna Convention and with the view of the leading authority whose article on the subject was introduced by the Government. It is also in conflict with the report to the Secretary of State of the United States Delegation to United Nations Conference on Diplomatic Intercourse and Immunities.

It is in these circumstances that this Court should assess the proposition advanced by the Government that the construction of the Convention by the State Department is entitled to great weight. The District Court did give great weight to the State Department's construction. It encouraged the introduction of all available documentation and testimony and it came to the conclusion that the Department's interpretations of the two international compacts were incorrect. The Court of Appeals paid practically no regard to the record with respect to the Bi-lateral Agreement and, in consequence, accepted the interpreta-

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* *United States* v. *Pink,* 315 U.S. 203 (1942); *United States* v. *Belmont,* 301 U.S. 324 (1937); *Weinberger* v. *Rossi,* 456 U.S. 25 (1982); *Dames & Moore* v. *Regan,* 453 U.S. 654 (1981); *United States* v. *County of Arlington,* 669 F.2d 925 (4th Cir.), *appeal dismissed, cert. denied,* 459 U.S. 801 (1982).

tions of the State Department, which have been inconsistent, ambiguous and contradictory.

Only this Court can settle these issues of widespread importance.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Vienna Convention on the Law of Treaties

Article 3

International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between states and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) the legal force of such agreements;

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(c) the application of the Convention to the relations of states as between themselves under international agreements to which other subjects of international law are also parties.